**REAL PROPERTY PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR**

**WHITE PAPER ON PROPOSED AMENDMENTS TO**

**F.S. SECTION 201.02(4)**

**I. SUMMARY**

Section 201.02(1), Florida Statutes, imposes a documentary stamp tax on deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to the purchaser or any other person by his or her direction, which tax is based on the consideration for such transfer or conveyance.

Section 201.02(4), Florida Statutes, provides that the documentary stamp tax imposed by Section 201.02(1) is also payable upon documents which convey or transfer, pursuant to Section 689.071, the Florida Land Trust Act, any beneficial interest in lands, tenements, or other real property, or any interest therein, even though such interest may be designated as personal property. Section 201.02(4) is the only provision in Chapter 201 pertaining to transfers of real property held in trust.

Existing Florida Administrative Code Rule 12B-4.013(28), adopted over 25 years ago, provides examples of conveyances to and from trustees that are or are not subject to the documentary stamp tax imposed by Section 201.02(1). This Rule is based on the general principles of documentary stamp taxation set forth in that Section, i.e., that taxability depends on whether there is a transfer of an interest in real property to a purchaser for consideration. Before providing the specific examples, this Rule states:

“(28) Trusts Pursuant to Chapter 689, F.S.: A deed to or from a trustee conveying real property is taxable to the extent that the deed transfers the beneficial ownership of the real property and to the extent that there is consideration for the transfer.”

In December 2018, the Florida Department of Revenue issued Technical Assistance Advisement (TAA) No. 18B4-003 (the “2018 TAA”), which involved a deed conveying real property owned by a corporation and encumbered by a mortgage to a revocable trust created by the corporation pursuant to Chapter 736, Florida Statutes. Chapter 736, Florida Statutes, contains the Florida Trust Code, which applies to express trusts, charitable and noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust. In the 2018 TAA, the Department took the position that the tax exemptions provided in Rule 12B-4.013(28) did not apply to a trust formed under Chapter 736 because the Rule was based on Section 201.02(4), which applies only to land trusts. The 2018 TAA referred to a limitation in Chapter 120 that the Department may adopt “only rules that implement or interpret the specific powers and duties granted by the enabling statute,” and in the Department’s view the only statute supporting Rule 12B-4.013(28) was the land trust provision in Section 201.02(4). As a result, the 2018 TAA advised that documentary stamp tax would be owed upon the conveyance of the real property to the revocable trust based on the outstanding mortgage amount at the time of the conveyance, even though the conveyance did not result in a change of the beneficial ownership.

The 2018 TAA is an express retreat from the Department’s existing Rule and is contrary to long-standing general proposition that deeds conveying real property to trustees are not transfers subject to excise tax, regardless of whether such real property is subject to a mortgage, unless such transfer will result in a change of beneficial ownership and there is consideration for the transfer. This TAA has caused great confusion, stress, and fear of uncertainty of a heavy documentary stamp tax burden among Florida residents and their advisors.

The proposed change to subsection 201.02(4) is intended to resolve the Department’s concern that it lacked express statutory authority to adopt the existing Rule 12B-4.013(28) that the documentary stamp tax imposed by Section 201.02(1), Florida Statutes, applies to deeds conveying real property to trustees only to the extent that the deed transfers beneficial ownership of the real property and to the extent that there is consideration for the transfer. With such statutory support, the Department would have authority to reaffirm its existing Rule and could recede from its 2018 TAA.

**II. CURRENT SITUATION**

Section 201.02(1), Florida Statutes, imposes a documentary stamp tax on deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to the purchaser or any other person by his or her direction, which tax is based on the consideration for such transfer or conveyance. The documentary stamp tax is a rate of 70 cents for each $100 of the consideration. For purposes of Section 201.02, “consideration” includes the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed.

Florida Administrative Code Rule 12B-4.013(28) provides examples of the taxability of conveyances to or from trustees pursuant to Chapter 689, Florida Statutes, which governs all written trusts. The first example in this Rule provides in paragraph (a) that “[a] deed from X to a trustee is exempt from the stamp tax to the extent of X’s beneficial ownership interest as a trust beneficiary, *whether or not the real property is encumbered by a mortgage*. For example, if X owns *encumbered or unencumbered* real property and conveys it to the trustee of a trust of which X is the sole beneficiary, the conveyance is exempt from the stamp tax.” (emphasis added)

In another example, paragraph (i) of that Rule provides that “[a] deed to a trustee from a grantor who has the power to revoke the trust instrument, and a deed back to the grantor from the trustee upon revocation of the trust, are not transfers of ownership subject to the stamp tax.”

A common estate planning technique for purposes of minimizing probate administration is for a property owner to convey the owner’s interest in real property to a trust of which the property owner (i) is the settlor, (ii) is the sole beneficiary during the owner’s lifetime and (iii) retains the right to amend or revoke the trust instrument. Such conveyances do not result in a change in the beneficial ownership of the real property nor does the trust provide consideration for the conveyance. Historically, the Department of Revenue has taken the position that, even if the real property is encumbered by a mortgage, such transfers are not subject to the documentary stamp tax imposed by section 201.02(1), Florida Statutes, a position that many Florida residents and their advisors have relied on for estate planning purposes. See TAA No. 09B4-003, TAA No. 94(M)-008, and TAA No. 93(B)4-014R.

The 2018 TAA essentially disavows the Department’s existing Rule 12B-4.013(28) and is inconsistent with the Department of Revenue’s prior long-standing position. As a result of the issuance of the 2018 TAA, it is possible that the Department of Revenue will decide that a property owner will no longer be able to transfer real property to a revocable trust of which the property owner (i) is a settlor, (ii) is the sole beneficiary during the property owner’s lifetime and (iii) retains the right to amend or revoke the trust, without the costly burden of paying documentary stamp tax on the amount of any outstanding mortgage at the time of the transfer. This possibility has caused great confusion and uncertainty among Florida residents and their advisors.

For example, if the Department applies the 2018 TAA to other taxpayers, there will be a significant impact on those of Florida’s elderly population who are in need Medicaid assistance for their long-term care. Unfortunately, Medicaid becomes the long-term care plan, if not the sole plan, for a number of Florida’s elderly population because Medicare does not cover long-term care and these elders cannot afford to private pay the costs of the long-term care at home or in a nursing home, which can easily run over $7,000 per month.

To accomplish their estate planning goals while maintaining their Medicaid eligibility and enjoying asset protection against Medicaid estate recovery provided by Chapter 409, Florida Statutes, Florida elders in need of Medicaid typically transfer their homestead interest to a revocable trust of which the elder is the sole beneficiary. Sometimes, an enhanced life estate is reserved in the transferor with the power to sell, convey, mortgage and otherwise manage the fee simple estate during the lifetime of the transferor without the consent of the remainder beneficiary (commonly known Enhanced Life Estate Deed or “Ladybird Deed”).

Such a conveyance for estate planning purpose does not have any impact on the elder’s Medicaid eligibility because it is regarded as an incomplete gift, or a gift subject to total divestment not subject to the five-year look back penalty. Upon the death of the transferor, the homestead interest vests in the revocable trust and will not be subject to estate recovery. A revocable trust provides flexibility when there are special needs, spend thrift concerns, and minor beneficiary concerns.

In 2021, the Department declined a request from another taxpayer to issue a letter ruling receding from the troublesome 2018 TAA, on the ground that the Department lacked authority to issue any regulations pertaining to trustee conveyances in the absence of an applicable statutory provision. Accordingly, the purpose of this proposed amendment is to create this statutory authority by adding a sentence to Section 201.02(4) to codify the general principle expressed in existing Rule 12B-4.013(28) that has been applied by the Department for decades.

Business trusts formed under Chapter 609 of the Florida Statutes or under similar laws of other states are treated as entities, like corporations or limited liability companies, that hold their own assets rather than holding assets as fiduciaries for the beneficiaries of a trust. Accordingly, the amended language proposed for 201.02(4) recognizes that a conveyance of real property to or from a business trust is always a transfer of beneficial ownership. Such a transfer may be exempt from documentary stamp taxation for lack of consideration, but that would be a result of the general consideration requirement in Section 201.02(1).

**III. EFFECT OF PROPOSED CHANGES**

The proposed legislation will create express statutory authority for existing Rule 12B-4.013(28) by adding a sentence to Section 201.02(4) to apply the general principle expressed in Section 201.02(1) to transfers of real property interests to or from trustees of written trusts under Chapter 689. Consistent with decades of practice by the Department and taxpayers alike, this general principle requires that there be a transfer of beneficial ownership and consideration for the transfer in order for the documentary tax to apply to the transfer. This proposed amendment will not change existing law, but will provide a basis for the Department to reaffirm its existing Rule that accurately reflects the principles of taxation embodied in the existing taxing statute, Section 201.02(1).

**IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state and local governments. Historically, the Florida Department of Revenue has not been collecting the documentary stamp tax on deeds conveying real property to trustees where the transfer did not result in a change in the beneficial ownership of the real property.

**V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The proposal does not have a direct economic impact on the private sector.

**VI. CONSTITUTIONAL ISSUES**

It is not anticipated that this legislation will raise constitutional issues.

**VIII. OTHER INTERESTED PARTIES**

The Florida Department of Revenue has an interest in this proposal. The Tax Section of the Florida Bar will also have an interest in this proposed legislation.